1944.

File No. O.B.R.T/44

Legal DEPARTMENT
A BRANCH

Subject:—

Opinions Under the Bomby Revenue Tribunal Act 1939

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File No.. O .B.R.T/44

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C O N T E N T S

Legal Department Vol.No. O.B.R.T./1944

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3.	O.N. 2962/20-4-44.	Question whether Govt. has power either revisional or appellate to interfere with the order passed by the Revenue Tribunal. Bombay Revenue Tribunal Act, 1939, Section 5 and 6.	
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7.	O.NO. 7711/7-11-44	Re:Encroachment by a private party on Govt.land Encroachment order passed by Govt. against the party. Appeal to the B.R.T. claiming ownership of land encroached upon. Question whether the appellant is likely to succeed in his appeal to the Tribunal and whether a writtn statement should be filed contesting the claim of the anpellant.	

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Office of the R.L.A.

The question of raising revenue is likely to arise directly or indirectly in the present case, for if the Railway Authority ultimately fails to establish its title to the piece of land in dispute, the Bombay Government will probably have a right to levy assessment on the land. Consequently as opined by the Commissioner, N.D. it should be treated as a revenue case; that is also the proper course to do, for even if the Revenue Tribunal holds otherwise, the Government's right to decide the appeal would remain unaffected.

Sd/- 17-3-44

Remembrancer of Legal Affairs.

U.R. to R.D. No. 2057 dated the 18th March 1944.

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The effect of the decision of the Bombay Revenue Tribunal as correctly stated in the note of Under Secretary, Revenue Department, is that non-agricultural assessment is leviable from the date on which the encroachment is detected when there is no satisfactory evidence to establish that the encroachment commenced earlier. The decision is correct in law. Under section 61 of the Bombay Land Revenue Code, 1879, the encroacher is liable to pay assessment for the whole period of his unauthorized occupation of the land. What that period is in each case is a question of fact which must be determined in the light of the law of evidence; and the burden of proving affirmatively the point of time at which the encroachment commenced would rest on the Crown. The discovery of the encorachment is obviously such satisfactory evidence, and, in the absence of evidence to show that the encroachment commenced earlier, would fix the commencement of the period of unauthorised occupation for which the assessment is leviable.

Sd/ 23-3-44

Remembrancer of Legal Affairs.

U.R. to R.D.No. 2203 , dated the 24th March 1944.

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Reading together the provisions of sections 5 and 6 of the Bombay Revenue Tribunal Act, 1939 it is clear that Government has no powers, either revisional or appellate, to interfere with the order passed in the present case by the Revenue Tribunal in respect of the terms of the lease granted to Mr. Bell. There is however nothing to preclude Government from revising the terms of the lease by mutual consent of the parties in which case the question of encroaching on the jurisdiction of the Revenue Tribunal would not arise.

Sd/- 19-4-44

Remembrancer of Legal Affairs.

U.R' to R,D, No. 2962 , dated the 20th April 1944.

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A note on the jurisdiction of the Bombay Revenue Tribunal in cases of appointment, heirship and lands of Shetsanadis.

The Tribunal has been constituted to try "revenue cases". The expression "revenue cases" is not defined anywhere in the Act The question as to what the expression should be taken to mean was discussed at a Joint conference at which the Hon.Minister for Home and Legal Department, the Advocate General, the Remembrancer of Legal Affairs and the Deputy Secretary, Legal Department, were present. In the note prepared at the conference the expression "revenue case" was defined as " case in which the right of Government to receive or raise revenue is involved."

2. This definition of the expression "revenue case" is not however very helpful. It has led to the assumption of jurisdiction by the B.R.T. in cases, which cannot, for the reasons discussed below, be really termed as "revenue cases". I would suggest as a practical working criterion the following wording: "a case in which the present or contingent monetory interest of Government conflicts with the rights and interests of a private party". This elucidation would appropriately cover cases of service watans and Shetsanadi lands because in these cases the right of Government to levy a higher contribution for the officiator remuneration, is often only contingent that is to say, it is dependent on the enhancement of the officiator's remuneration and increased in the survey assessment at successive settlements.

3. In the light of this amplification, the following considerations emerge regarding jurisdiction in Shetsanadi cases so far disposed of, by the B.R.T.; these cases fall under the following categories,viz, cases involving;

(1) appointment of Shetsnadis;
(2) shetsanadi heirship cases;
(3) restoration of sanadi land or levy of contribution
(4) Resumption of discharged sanadi lands for improper alienation.

4. Cases of the last class are undoubtedly revenue cases as there is a direct conflict between the monetary interests of Government and of the parties is actual possession of the lands. Jurisdiction has, therefor , been correctly assumed by the B.R.T. in the case of Krishnabai kom Nagusa Katwa No.619-0/53 of 10-2--41 and in similar subsequent cases.

5. In cases falling withinthe third category, two distinctions have to be made : (1) the non-officiatorfrom whom the land is resumed or contributionis levied may come in appeal. Here Government gains a monetary advantage at the expense of the non-officiator and so the B,R.T. has jurisdiction (vide case of Hosureppe Kariyellappa, No. 685-0/142, dd of 6-6-1941 and similar subsequent cases). (ii) But the aspect becomes different when the officiator comes in appeal urging that the contribution levied. is insufficient or that he should be givern actual possession of the land instead of the constribution levied. In cases of this type the amount of remuneration in cash or land, to be paid by Government and its officiaetors, duly empowered in this behalf; it seems reasonable to hold that this purely discretionary duty of determining the proper remuneration for any given type ofservice rendered to Government, cannot be handed over to a Tribunal which adjudicates on the conflicting rights of the state as against individuals. There cannot , therefore, be any conflict between the interest of Government and of the officiator in such a case. The B.R.T. cannot, therefore be said to possess jurisdiction to entertain appeal by a Sanadis complaining that their remuneration is inadequate or that they should be paid in land when they were paid incash. Jurisdiction was, it seems, incorrectly assumed in the cases of Yellappa Bharmappa Kalgonnanaver (0/203 of 1940) and Lalu Malikaa Walikar (0/70 of 5-3-42) and similar subsequent cases.

6. In cases of the first of the four categories enumerated in para. 3 above viz. cases relating to appointment of shetsanadis, the B.R.T. has correctly held that it has no jurisdiction vide the case of Dyawanna San-Geneppa Celler(o/213 of 11-8-41).

7. As regards cases of the second category, viz, heirship cases Government has always contended that shetsanadis are not watandars with hereditary rights and the B.R.T. has held in the case of Krishnabai kom Naguse Katwa (O/53 of 10-2-41) that the decisions of the Civil Courts following Limbaji vs. Rama, to the effect that shetsanadis are watandars do notbind Government. The fundamantal consideration is that shetsandis posses no hereditary rights and the appointment of the heir of the last shetsanadi in his place is purely a matter of grace and does not involve the recognition of a right. Hence cases of this category ar not essentially different form cases of the first category which have been held to lie outside thejurisdiction of the B.R.T. In the case of Huseni Bapu (338-O/302 of 8-7-40) however, jurisdiction was tacitly assumed. The question of jurisdiction was specifically discussed in para. 3 of the decision in the case of Mariyappa Hanmappa Chittappannavar (453-O/421 of 3-10-40) Two issues were raised therein viz. (1) whether Mariyappa is entitled to retain possession or whether the respondent Mallappa is entitled to obtain possession from Mariyappa; (2) if Marippa is held to be entitled to retain possession, whether the Collecter's order imposing full assessment is correct. Para. 7 of the same decision shows that the second point was not in issue. It was, therefore, superflous to raise the issue and hold that it made the case a revenue case as is done in para. 2 of the decision. The question of jurisdiction was also referred to in para. 2 of the decision in the case of A.H. Somalapur and another (no.681-O/128 of 4-6-41) and it was held to be a revenue case because "the Collector had awarded both the land and the service to the respondant. To award land and service to a person is to appoint him as shetsanadi, and if the latter is not a revenue case; xhat is why the as held in (O/213 of 11-8-41) the former also cannot be such. The mere fact that lands are involved in a case does not make it a revenue case; that is why the B.R.T. has repudiated jurisdiction in re-storation cases of pargas watan lands)V.S. Deshmukh, No. 668-O/128 of 10-5-41). It ass mes jurisdiction in cases of service watan lands because the right of the non-watandar holders. In shetsanadi Government to enhance scale judi in future conflicts with the rights of the non-watandar holders. In shets nadi cases, the lands and service generally go together from one party and can judge the issue quite impartially. Such cases cannot therefore be brought within the scope of a deceased watandar kulkarni is not a revenge case as held in the appeal described in para. 1 above. If the succession to the share of a deceased watandar ulkarni is not a revenge case as held in the appeal of P.R.Kulkarni (No. 744-O/220 of 13-8-41) there is much less reason to consider the succession to a deceased shetsanadi's office and lands, a revenue case.

8. The conclusions of this note may be summed up as under:

(1) The tribunal has no jurisdiction when the question is of transfering the service and lands together, by reason of appointment of succession, from one personto another.
(2) The tribunal has jurisdiction when a party is deprived of land orwhole or part of the profits of land, for the benefit of Government or of the officiator.

Sd. V.S.Bhide,
Commissioner, S.D.

No. Hearing/Masibnal/1944.
Poona, 30th March 1944.

Sir Govind Madgavkar, President Bombay Revenue Tribunal, begs to forward a copy of the accompanying note by Mr. V.S.Bhide, Commissioner, S.D. on the question ofthe jurisdiction of the Bombay Revenue Tribunal in Shetsanadi cases. The President,Bombay Revenue Tribunal, would be glad to be foreured with the views of the officers to whom this copy is sent within one month.

To

The Commissioners C.D . & N.D.
Dewan Bahadur P.B.Shingne,M.O.M.B.R.T,
The Remembrancer of Legal Affairs.

President,
Bombay Revenue Tribunal.

S.C.

No 3 2 2 3
Office of the R.L.A.
Bombay Castle, 3rd May 1944.

From

P.N.Moos, Esquire, Bar-at-law, I.C.S.
Remembrancer of Legal Affairs,

To

The President,
Bombay Revenue Tribunal.

Subject.- Jurisdiction of the B.R.T'with regard to shetsanadi assignments.

Sir,

With reference to your endorsement No. Hearing/Mahibanal dated the 30th March 1944, on the above subject, I have the honour to forward herewith a copy of the opinion recorded by me in the above matter.

Your Obedient servant.

Remembrancer of Legal Affairs.

Copy of the opinion forwarded to R.D. Memo No. 447
file B.R.T. a E K/45 16-1-45

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The question raised is as to the precise extent of the jurisdiction of the Bombay Revenue Tribunal, with reference in particular to cases relating to Shetsanadi assignments.

2. Section 296 of the Government of India Act, 1935, envisaged legislation for the consitution of a tribunal to entertain appeals and to revise decisions in revenue cases, and the Bombay Revenue Tribunal Act, 1939 makes provisions accordingly. Section 4(1) of the latter Act provides that the Tribunal shall have such jurisdiction to entertain appeals and revise decisions in revenue cases as was vested in the Provincial Government immediately before the 1st April 1937 under any law for the time being in force. The expression "revenue cases" is not defined; and at a joint conference attended by the H.M.L.D. Advocate General, Remembrancer of Legal Affairs, and Deputy Secretary Legal Department it was construed to mean cases wherein the right of Government to raise or receive revenue is involved. The commissioner, S.D. states that this definition has not been of practical assistance and has even led to the assumption by the Tribunal of jurisdiction in cases wherein, upon a proper view, it had none. The difficulties which have arisen regarding the jurisdiction of the Tribunal is due if one may say so with respect not to any ambiguity in the above definition but to the circumstance that the wide wording of section 4 appears <u>prima facie</u> to transfer to the Bombay Revenue Tribunal appellate and revisional jurisdiction in all revenue cases wherein the Provincial Government exercised jurisdiction before the 1st April 1937. To construe this section in its wide generality would lead to confusion, and the Tribunal itself has has recognised that some limitation must be imposed upon the terms of section 4. Thus in the Annevari case, the Tribunal held the matter rested upon executive orders and not on statute, and was therefore not a case falling

S.C. 4 Copies

within its discretion; while in Bingappa Sharamappa's case, St Sebastian Homes Co-operative Housing Society's case, the Thana D.L.B .'s case which was case wherein the order under appeal was in pursuance not of executive orders but of statute, the Tribunal declined jurisdiction as the order rested upon administrative discretion. Thus, while establishing that section 4 must be read in a restricated sense, the decisions do not disclose a clear principle which would demarcate the revenue cases which fall within the Tribunal's jurisdiction from these which do not.

3. It is however possible to deduce such a principle upon a closer examination of the true character and function of the Tribunal in the light of the relevant provisions of the Government of India Act, 1935 and the Bombay Revenue Tribunal Act, 1939.

Section 49(1) of the Government of India Act, 1935 provides that the executive authority of the Province shall be exercised on behalf of his Majesty by the Governor, either directly or through officers subordinate to him. Section 296, which speaks of a tribunal, evidently contemplates a body exercising judicial powers; it is not intended to be an "oficer subordinate to the Governor" to whom any executive authority can be properly entrusted under section 49(1). It is a fundamental principle of jurisdiction that no man can be judged in his own cause, and the object of section 296 is to give effect to it by securing that in disputes between the Crown in xx and the subject involving question of the right of the Crown to raise or receive revenue, the final appeal by way of administrative process should lie, not to the executive Government , but to a tribunal independent of it. The Bombay Revenue Tribunal Act, 1939, carries out this object The Tribunal constituted there-under has a non-official majority and its decisions are final in the sense that they are not subject to the appellate of revisional jurisdiction of Government. See sections 6,7 and 11.

These considerations clearly indicate that section 4 of the Bombay Revenue Tribunal Act, 1939, upon a proper construction

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must be read in a restricted sense so as to confer upon the Tribunal appellate and revisional jurisdiction to the extent only that it involves performance of judicial functions, that is in such revenue cases only where in the decision involves adjudication of rights and liabilities between the Crown and the subject.

This conclusion is inevitable if the matter is considered from another point of view. It is obvious that the appellate and revisional jurisdiction exercised by Government in revenue cases immediately before 1st April 1937 extend to matters pertaining to the executive authority of Government Thus, though the act of the Collector in granting a piece of land was subject to such revisional jurisdiction (see Mulka vs. Secretary of State 36 Bom. L.R. 242 P.C.) the order which Government might make in such a case was executive in charact for it merely decided whether to dispose of Crown property, and if so on what terms and conditions. And the circumstance that such order is passed in what the statute calls appeal or revision does not affect the Character of the order passed, and the effect of the statute (e.g. B.L.R. Code) is merely that revenue officers are invested with power to exercise such functions but subject to the overriding powers of superior officers and in the last report of Government orders writing off arrears of land revenue, or suspending recovery thereof or remitting it or granting exemption which Government could pass in appeal or revision, are likewise executive in character. If section 4 of the Bombay Revenue Tribunal Act, 1939 were to be given a wide construction in accordance with the apparent meaning of the language used, the Tribunal will be invested with the power to pass these and other executive orders. To adopt this construction must necessarily introduce confusion in the land revenue administration and lead to interference with the scheme of the constit tion as envisaged in the Government of India Act, 1935. The section, so construed, would be repugnant to the express provisions of section 49(1) of the Gover

ment of India Act, 1935, and for that reason ultra vires: Secy of State vs. Moment, I.L.R. 40 Cal, 393 P.C. As the section can be properly read in the restricted sense above said, and as by so reading the inconsistency with the Government of India Act, 1935 can be avoided, it must be so read; for there is a presumption that a legislature exercising restricted powers does not intend to exceed its powers and the generality of expression employed its enactments must be restricted to matters within the jurisdiction: see A. G. for Ontario vs. Reciprocal Insurers 1924 A.C. 328 at p. 315, In re Hindu Womens Rights to Property Act, 1937, (1941) 3 F.C.R.12.

4. That the functions of the Tribunal ~~xxx~~ as are judicial A limits the jusidiction of the Tribunal both as to the cases of which it can take congnizance and as to the nature of the orders it it can itself pass. As regards the former, it has jurisdiction in all cases wherein the Act or order complained of it judicial in character. And a judicialAct, in this connection, can be taken to mean an act of competent authority, upon consideration of facts and circumstances, and imposing ~~liabi~~ liabilities or affecting rights of others: of . From United Breweries Co.Vs. Bath Justices A.C. 589 at p. 602. Therefore the Tribunal can entertain an appeal or revision petition in a revenue case where (1) the order or / A act complained of is alleged to impose liabilities of affect legal rights of others: and (2) the order is challenged on the grounds that it is wrong in law, or is based on an erroneous assumption of facts or, in so far as it involves exercise of judicial discretion, is improper. And the functions of ~~judicial discretion~~ the Tribunal in deciding the appeal or revising any decision are restricted to determining the validity of the objections of this nature. Thus, inrespect of an order of the Collector imposing non-agricultural assessment and fine, the Tribunal can and must determine whether upon facts found the assessment was lawfully levied, in accordance with the sanctioned rates: but it cannot reduce the assessment on the ground, for instance, that it is ~~xxx~~ excessive or would cause hardship, because it would trench upon the executive authority of the Province if it were to do so. But the order as to fine

S.C.

involves exercise of judicial discretion and can be set aside or modified by the Tribunal notwithstanding that it was correct in law.

5. In the light of these foregoing the position with respect to the several clauses of shetsanadi cases would be as follows.

(1) Appointment of shetsanadis: The appointment of shetsanadis is an executive act, and no question of legal right is involved; nor is any question of affecting the right of Govt. to raise or receive revenue. Appointment to any civil post in connection with the affairs of the Province is an executive act to be performed by the Governor or any person appointed by him. cf. section 241 of the Government of India Act, 1935. Hence cases under this head do not fall within the Tribunal's jurisdiction

(2) Heirship cases: As pointed out by the Commissioner S.D. Government has held that shetsandadis are not heriditary village servants; and if the Tribunal is inclined to adopt this view pending an authoritative decision of the High Court, the position is that on the death of a sanadi Government merely appoints a new sanadi and gives him possession of the land and the case is indistinguishable from the preceding category. Even on the assumption that the case is a revenue case, the decision as to which person to appoint is one pertaining to the executive functions of Govt.

(3) Restoration of land or levy of contribution;

(a) As pointed out by the Commissioner, S.D. an appeal by a non-officiator affected by the order is within the jurisdiction of the Tribunal (b) An officiator's appeal on the gound that the Collector should have given him possession of the lands instead of directing payment of contribution is beyond the jurisdiction of the Tribunal. The order complained of does not affect a legal right of the appellant nor does it imposes a liability. The complaint, in substance in the remuneration provided by the order is not as much as it might have been:

as it it might have been : and the question being in substance a question as to the sufficiency of the remuneration provided pertaining to the executive authority of Government.

(4) An appeal by an alience of sanadi land who is evicted therefore lies to the Tribunal, as the order affects the prima facie rights of the appellant, but of course the Tribunal can only determine whether the order is had by reason of any error of fact or law.

6. The Tribunal has considered the question of its jurisdiction in several cases, but no detained reference is made to them in this note for the reason that the Tribunal apparently desires to reconsider the question afresh unembarrassed by Precedent. It may however be pointed out that most of the decisions can be reconciled and explained upon the construction of section 4 suggested above.

Sd/- 2-5-41
Remembrancer of Legal Affairs.

Bombay Revenue Tribunal
Procedure for presentation of or Government's case before --in cases fixed for hearing arguments of obtaining Government's written statement

Government of Bombay,
Revenue Department,
Circular No. 3724/39.
Bombay Castle, 14th August 1944.

Circular of Government

It has been noticed that translations in English of important documents, maps and sketches which are in the regions language are frequently not funnished by Collectors when submitting their reports in cases pending before the Bombay Revenue Tribunal. The attention of Collecters is therefore specifically invited to the procedure laid down in paragraph (2)(v) and (vii) of Government Circular. No. 3724/39 dated 16th August 1941.

By order of the Governer of Bombay.

J.B.Bowman,
Under Secretary to Government.

To

The Commissioner of Divisions,
The Commissioner of Excise,
All Collectors,
The Collector of Bombay, Land Revenue Department
The Remembrancer of Legal Affairs.

No. of1944.

Copy forwarded for information and guidance to .

Submitted for information

File in O.B.R.T./44

The only question raised in this reference is whether the R.D. may direct a petitioner before it to apply to the Bombay Revenue Tribunal as the matter involved in the petition is a "rev "revenue case" (s.4 of the Bombay Revenue Tribunal Act 1939)

Channukhan and Mahmedkhan were two brothers belonging to a sanadi family. Channukhan was the elder brother, S.N.S. 58 an 60 were the Sanadi lands. The service was performed first by Mahmedkhan, but then it was transferred to Channukhan. In 1918 there was an agreement between the brothers. Channukhan retaini ing the right of service and a portion of S.N. 60. Mahmedkhan took S.N. 58. This arrangement was further confirmed in a partition deed of 1931. In 1932 Channukhan resigned and his so Huseinkhan was appointed sanadi. Thereafter Huseinkhan appears to have obtained possession of a portion of S.N. 58 from the so s of Channukhan On 24-6-42 the latter applied to the Collector f r restoration of the right of Sanadi service and the lands apper taining to it. On 20-11-43 the Collector not only dismissed th application but ordered restoration to Huseinkhan of the portio of S.N. 58 still remaining in the possession of Channukhan's sons. One of t ese sons has joined Military service but the oth r has petitioned Govt. for revising the Collector's Order. Pl. see the two B.R.T. decision put up (case No.685 (O/142) p. 127 of part II of 1941 and case No. 792 (O/267) p.238 of part III of 1941), Para 3of the case R.D. note, para 5 of the note o the jurisdiction of the B.R.T. at p.27 of file O.B.R.T./44 and R.L.A's opinion at (3) on p. 48 of the same file. The petitio peitioner is a non-officiator. The case appears clearly to be a revenue case.

Papers may be seen and returned.

Sd/ 10-1-45

Translation

To

23

The Digtrict Deputy Collector,
Broach

I, Mahmad Asmal Amiji of Sarod, Taluka Jambusar, now residing at Nahar, Taluka Jambusar, respectfully beg to state that in the said village (i.e. Sarod) I xnown a house to the north of Mota Falia. I have come to know that the land covered by the o'ta on the north side of the house is declared to be Government land and encroached upon (by the construction of the otta). In this connection, I respectfully submit as under .-

1. Since last 10 years or so, I am staying at Nahar Taluka Jambusar where I am running a shop. I do not therefore know anything about the proceedings relating to this encroachment.

2. Since my father's time we are in the actual possession and enjoyment of the ground floor of the said house which was purchased by my father Asmal Amiji Mahomed from his uncle Adam Mahomed Valibhai for Rs. 500 under a registered document Since then it was in the possession of my father and has been in my possession since my father's death. My uncle Isap Amiji - resides on theupper floor which is of his ownership. He has however no claim whatsoever on the ground floor owned by me. I do not therefore agree that there has been any encroachment as alleged.

3. To the west of my house, there are two houses owned by my cousins. The length of my house is equal to that of those two houses.two houses. The ottas are also of equal length. These ottas were constructed when the houses were ouli Nothing has been constructed afterwards. The land records of Sarod are not correct. I do not accept the statements made my uncle Isap Amiji about my house. I therefore request that a fresh inquiry may be held and the encroachment order may be withdrawn.

15/19-4-42.

'd. Mahomed As

Office of the R.L.A.

It appears that one Isap Amiji Dang claimed ownership over a part of Government land, whereupon the District Deputy Collector, Broach Division held a formal inquiry under section 37(2) of the land Revenue Code and rejected his claim. He appealed to the Collector without any success and his appeal to the Revenue Tribunal was rejected on 21st February 1942. Thereafter one Mr. Mahmad Asmal Amiji, a nephew of Mr. Isap Amiji, applied to the District Deputy Collector, Broach on 19th April 1942 claiming ownership over the same land and requesting an inquiry to be held under section 37 of the Land Revenue Code. The District Deputy Collector refused to hold such inquiry observing that if the applicant had any interest he ought to have put forth his claim when notices under rule 29(1) of the Land Revenue Rules were only published in the course of an inquiry held on the application of Mr. Isap Amiji Dang. On appeal the Collector confirmed the order of the District Deputy Collector holding that a proper notice of the previous inquiry held on the application of Mr. Isap Amiji Dang was validly given as provided under sub-section (4) of section 39 of the Land Revenue Code and consequently Mr. Mahmad Asmal Amiji, the present applicant, was bound by the result of that inquiry. Mr. Mahmad Asmal Amiji has now appealed to the Revenue Tribunal contending that he was not bound by the result of the inquiry held on the application of mr. Isap Amiji Dang and requesting that a formal inquiry under section 37(2) of the Land Revenue Code should be ordered. The revenue Tribunal has requested Government to put in a written statement showing cause why the appeal should not be allowed and the orders of the Prant Officer and the Collector reversed and the appellant's claim decided by a formal inquiry. The Commissioner, Northern Devision who is one of the members of the Bombay Revenue Tribunal observes in his endorsement at page 9 ante thus.-

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"The Collector's interpretation of section 37(4) of the Land Revenue Code is that if notices of an inquiry or order were published and served in accordance with the rules made in that behalf anybody and everybody can be deemed to have had due notice of the inquiry or orders, no matter he was not a party to the proceedings or was not staying at the village concerned. This interpretation is clearly incorrect. What the section means is that if the person concerned cannot be found, he must be deemed to have had due notice of the inquiry or order even if a copy of the notice is affixed to some conspeicuout part of his usual residence andnot delivered to him (vice land Revenue Rule 29(1)(b) and section 190, Land Revenue Code). As the appellant claims the land as against Government, it is necessary to hold the formal inquiry under section 37(2) of the land Revenue Code. In the circumstances, it may be recommended to the Bombay Revenue Tribunal to reverse the orders of the Prant Officer andthe Collector, to allow the appeal andto direct the decision of the appellant&s claim by a formal inquiry.

The Secretary, Revenue Department observes at page 13: "The Commissioner's criticism of the Collector's interpretation of section 37(4) is probably correct but if the legal position is that inquired have to he held whenever any person preferred a claim - however frivolous - to ownership of land as against Government even in decided cases than the position wouldbecome intolerable." The R.L.A. is requested to advise whether the appellant is likely to succeed in his appeal to the Revenue Tribunal andwhether a written statement should be filed contesting the claim of the appellant.

2. The main question for consideration is whether the appeal is defensible. The claim of Mr. Mahmad Asmal Amiji, the present appellant, for a formal inquiry under section 37(2) of the Land Revenue Code was rejected both by the District Deputy Collector and the Collector mainly on the ground that he was bound by the decision in the formal inquiry held on the application of Mr. Isap Amiji Dang.

The appellant has urged in his appeal memorandum that this grou ground on which his claim for holding a f rmal inquiry was rejected, was invalid and is contravenion of the provisions o the land Revenue Code. Consequently the decision of the preso appeal will turn on the point whether the present appellant is bound by the decision in the previous inquiry. "Where a judgment or a decree is tendered in evidence not merely in proof of its existence and legal consequences, but to conclude as opponent upon the facts determined, the effect will vary according as it is a judgment in rem or a judgment inter partes. The former binds the world, the latter only the parties and the privies", (see Sarkar's Evidence Act, page 403). A final judgment, order or decree of a c ompetent court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction is a judgmen in rem.(see section 41 of the Indian Evidence Act). All those which are not judgments in rem are judgments inter partes and bind only the parties to the proceedings. Evidently a decision after an inquiry under section 37(2) of the land Revenue Code is a judgment inter partes and consequently it would be binding onthose alone who were parties or privies to the proceedings. The present appell was not a party to the inquiry - proceedings between Government and Mr. Isap Amiji Dang, nor does he claim through Isap Amiji Dang. It is therefore evident that the present appellant cannot bebound by thzt, decision. This conclusion is in no way inconsistent with the provisions of section 37 of the Land Reverue Cede read withrule 29 of the Land Revenue Rules. The words "after formal inquiry of which due notice has been given" in sub-section (2) of section 37 of the Land Revenue Code clearly indicates thatnotice of inquiry is to be given to ant person who makes a claim to the land in occupation of Government of or against whom Gove nment claims the land in his occupation. Sub-section (4) no doubt provides that any person shall be deemed to have had due notice of an inquiry or order under this section if notice thereofhas been given in accordance

with rules made in this behalf by the Provincial Government. The words "any person" in this sub-section mean any person who makes a claim to the Government land or against whom the Crown makes any claim in in respect of the land in his possession as contemplated in sub-section (2). Further; sub-rule (b) of rule 29(1) of the Land Revenue Rules provides that a copy of notice shall beserved not less than ten days before the inquiry on all persons who are known or believed to have made any claim to the subject-matter of the inquiry, and every such notice shall be served in the manner provided insection 190 for the service of a summons. a notice under rule 29(1) is to be given given in form B. That form clearly indicates that then notice is intended to begiven to certainspecified persons, that is to say, persons who are known or believed to have made any claim of the subject-matter of theinquiry. Obviously, such notice is not intended to be a public notice in the sense that all persons whether they have any claim to the property or not and whether they ar properly served with any notice or not would be deemed to have had such notice. Reading sub-sections (2) and (4) of section 37 of the Land Revenue Code with rule 29 of the Land Revenue Rules it appears clear that all those personswho have made a dininite claim to the property or who are believed to have made any claim to such property should be given due notice of the inquiry and it is only those persons who would be bound by the result of the inquiry. For instance, there may be a person who has not made any formal claim to Government land, but the reverue officers may be knowing that such person has been asserting his claim to the land. It would be necessary for the Collector to give notice to such person in the inquiry held under section 37(2) onthe application of any other person even though the person has not made any formal application for inquiry. If on notice such perser does not choose to put in his formal contentions or lead any evidence on his behalf insupport of his claim, if any, he would be bound by the decision of the inquiry. It is only such person who is contemplated by the words "believed to have made any claim "

in sub-rule (2) of rule 29(1) of the land Revenue Rules. It follwws therefore that the view taken by the District Deputy Collector and confirmed inappeal by the Collector that Mr. Mahmad Asmal Amiji, the present appellant, was bound by the decision in the previous inquiry is notcorrect. The view taken by the Commissioner, Northern Division, in this respect is correct.

4. The next question for consideration is whether the Collector is bound to hold a formal inquiry under section 37(2) of the land Revenue Code however frivolous the applic tion maybe . Sub-section (2) of section 37 of the Land Revenue Code provides that where any property or any right in or over any property is claimed by or on behalf of the Crown or by any person asagainst the Crown, it shall be lawful for the Collector or a survey officer, after formal inquiry of which due notice has been given, to pass an order deciding the claim.

"Accordingly to Lord Cairns, such words as "it shall be lawful" are always permis ive or ~~shall~~ enabling. They confer a power and do not, of themselves. do more. But there may be something in the nature of thething - empowered to be done, something in the object for which it is to be done, something in the conditions under ~~which~~ which it is to be done, something in the title of the persons for whose benefit the power is to be exercised, which may couple the power with a duty, and ~~in~~ make it the duty of the perso in whom the power is reposed to exercise it when called upon to do so. It lies on those who contend that an obligation exists to exercise the power to show in the circumstances of the case something which according to the above principles created that obligation and the cases decided only that where a poter is deposited with the public officerfor the purpose of being used for the benefit ofpersons who are specially pointed out and with regard to whom a definition is supplied by the Legislature of theconditions upon

which they are entitled to call for its exercise and the court will require to be exercised (5 App. Case page 225) Lord Selbburne's view was that the words such as "it shall be lawful" are not ambiguous and susceptible either of discretionary or an obligatory sense, but their meaning is the same whether there is or is not a duty or obligation to use the powers which they confer. They are potential and never (in themselves) significant of any obligation. The question whether a judge or a public officer to whom a power is given by such words is bound to use it upon any particular occasion or in any particular manner must be solved aliunde and in general it is to be solved for from the context, from the particular provision, or from the general scope and objects of the enactment conferring the power." (S App. Case. page 235; Maxwell pages 214, 215).

The objects of sub-section (2) ; (3) and(4) of section 37, Land Revenue Code, is stated by Gupta in his Land Revenue Code at page 179 thus.-

Under the law as it stood before 1913 there was no finality to the record that was made under the city survey. It was open to any person at any time subject to the general statutes of Limitation to question the entries made under the city survey, so there was no certainty of the surve y record being correct and the provisions which existed in the Land Revenue Code or the Municipal Act were insufficient to give finality within a reasonable time to the record under city survey. One of the objects of the city survey was to secure an authoritative and final decision with regard to municipal property. Section 37 could never become final and the same uncertainty applied to Government land transferred to municipality. In order therefore to increase the benefits of the survey and safeguard property, it was found necessary to invest the Collector with power to give his decision which would be open to question for only one year, so that the finality of the city survey should be arrived at."

If the words " it shall be lawful" in section 37(2),Land

Revenue Code are interprted to be permissive or enabling, it appears that the very subject of sub-sections (2), (3) and (4) of section 37 would be frustrated, for there would be no finality to the entries made inthe survey record. It is however arguable that this power to hold an inquiry under section 37(2) is intended to facilitate the quick disposal of calims to Government Land and there can be no obligation on the Collector to hold an inquiry when prima facie a claim to Government land is either untenable or frivolous. Reading between the lines it appears that section 37(2) requires the Collector to hold formal inquiry in all cases where a claim to Government land is not without any substance. In other words it means that where there is prima facie a good claim to Government landor a semblance of right thereto, it appears that the Collector should hold an inquiry in cases where the claim is ~~x~~ either frivolous or prima facie ~~untenable~~ untenable. The view taken by the Secretary, Revenue Department in this connectionappears to be correct. But Government may ~~n~~ not be able to urge this ground in defence of the present appea for neither the District Deputy Collector not the Collector has based his order on this ground, namely, the frivolous nature of the application. It is very doubtful whether the Revenue Tribunal will allow Government to raise this contention. As stated above the appeal does not appear to be defensible on the ground that the decission in the previous inquiry is binding on the present appellant. Inthe circumstances it is for Revenue Department to decide whether the ap should be defended on the ground that the claim of the present appellant was frivolous and hence the Collector was not bound to hold as inquiry. If Revenue Department decides to contest the appeal on this ground, papers may be returned to Legal Department for preparing a written statement.

Sd/- 6-11-44
Remembrancer of Legal Affairs.

U.R.to R.D. No. 7711, dated the 7th November 1944.

S.C.
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